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No. 974

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In the Supreme Court of the United States

OCTOBER TERM, 1957

GEORGE F. MOORE, *Petitioner*

v.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation; SHELL OIL COMPANY, a Corporation; THE TEXAS COMPANY, a Corporation; RICHFIELD OIL CORPORATION, a Corporation; GENERAL PETROLEUM CORPORATION, a Corporation; TIDE WATER ASSOCIATED OIL COMPANY, a Corporation; and UNION OIL COMPANY OF CALIFORNIA, a Corporation, *Respondents.*

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD MCL. DAVIDSON
W. H. FERGUSON
C. S. BURDELL

Attorneys for Petitioner

1012 Northern Life Tower
Seattle 1, Washington

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Petitioner hereby submits the following reply brief.

I. Petitioner seeks certiorari to review the decision below, not a *de novo* review of the record.

Petitioner seeks certiorari because the court below excluded virtually all documentary evidence offered by both sides as a matter of law. It con-

sidered the 119 exhibits to which its attention was "specifically directed", the 46 exhibits where "detailed (but incomplete) reference and arguments" were made and the six series of exhibits "dealt with at length in the briefs" (Opinion, Pet. App. 37A-38A, Br. in Opp. p. 6) *but was unable to find that a single one was erroneously admitted* "in the light of the authenticating evidence." Instead, it found virtually all of the 1088 documents admitted were incompetent as a matter of law, including those which were neither specified as error nor argued.[1] The court did so on sweeping new legal rules of exclusion applicable to all cases and all documents offered as business records or as acts, declarations and admissions.[2] The court below did not "apply the elementary rules of evidence to hundreds of exhibits considered in the light of the authenticating evidence in the voluminous record of this particular case," (Br. in Opp. p. 7) but instead invented new and novel rules of exclusion applicable to all possibly relevant classes of documents. Petitioner does not seek to have this Court review the factual authentication of each document. The court below performed that function and was unable to find any error upon that basis.[3] Petitioner does ask this Court to review the exclusionary rules adopted by the court below: Is a document not a business record (1) merely because it relates to a competitor's ac-

[1] These would include, among many other perfectly routine documents, the "weekly reports or surveys of highest, lowest and average prices posted at retail outlets in specified area." (Opinion, Pet. App. 39 A)

[2] Respondents here, as in the court below, assert concessions never made by Petitioner. Thus Respondents assert that Petitioner does not seek review of three other minor errors and "concedes that they require that the case be retried in any event." (Br. in Opp. p. 3) This reference is to Petitioner's contrary statement that "The Court below reversed solely upon legal grounds barring admission of the documentary evidence," noting that "The few other errors discussed were inconsequential and related only to minor matters to be avoided upon re-trial."

[3] If, of course, the court below did not perform its function of reviewing the record at all, then its decision must necessarily be reversed, since petitioner then has had no hearing.

tivities, (2) because it gives reasons for economic activity, (3) states the source of the information, (4) was "authorized" but not required, or (5) relates to casual day-to-day activities of the business? Is a document inadmissible as an act, declaration or admission unless expressly authorized or ratified by the directors or stockholders of the maker?

II. The Court Below held all documents incompetent upon the basis that the authenticating evidence established their admissibility as a matter of fact.

The court below held most documents inadmissible "notwithstanding it may have been made in keeping with systematic and routine procedures, and concerns a matter of importance to the business." (Opinion, Pet. App. 40A) Respondents attribute gross error to petitioner's acceptance of the lower court's avowed basis of its decision. It is true that only Standard Oil Company conceded this at the trial. The trial court found it to be a fact. The lower court found, or at least based its decision upon the assumption that, it was true as to all of respondents' documents.

III. The only prejudice found by the lower court was the probative force of the documents.

The documents admitted were neither found to be prejudicial by the court below nor conceded to be such by petitioner except in the sense that they constituted the essential relevant evidence necessary to sustain the verdict. The court below reversed because "If none of these inadmissible exhibits had been received, the evidence would have been insufficient." It did not reverse, as respondents requested it to do, upon the grounds that the jury was preju-

diced by assertedly inflammatory or accusatory irrelevancies contained in any documents[4] or by improper argument to the jury based upon any such writings.[5]

IV. Respondents confuse admissibility with the coconspirator rule.

In their discussion of Exhibit 5-A, respondents again seek to confuse application of the coconspirator rule with admissibility of evidence. It, like all of the other records, was offered against Union Oil Company, subject to the giving of the court's precautionary instruction. It was admitted upon proof under the Business Records Act[6] and upon the court's express understanding that it was offered as:

> ". . . part of the acts and conduct of one of these alleged conspirators, in the course of the alleged conspiracy". (R.3926)[7]

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[4] Indeed, whenever respondents requested deletion of any language they deemed objectionable, the court did so.

[5] Rspondents studiously refrained from requesting any instruction limiting the use of any evidence upon its admission or in argument, but chose at all times to stand upon its objections that no writing was admissible at all.

[6] Exhibit 5-A, like all of the other documents, was identified as having been made in the regular course of business. It is on the same form as 6-B and 12 other exhibits introduced by both sides. It bears both the initial and stamp of T. G. Wise, who was Northwest Territory Manager at the time. It is marked "noted" by "L. C. B." (Mr. Burklund), the manager of the Seattle Sales Service Department, initialed by R. E. B. (Mr. Bontemps) Assistant-Manager, and by D. M. M. (Mr. Mabon) and L. E. Larson, both in that department, and K. K. (Kay Kessner) Secretary of the Territory Manager (R. 3912-12).

Neither Exhibit 6-A nor Exhibit 5-A are typical of the documents offered in evidence. Most documents were either instructions to field representatives, which Respondents agree are admissible (Br. in Opp. p. 19, n. 14), or were reports made in accordance with such instructions.

[7] This exhibit was admitted upon dual authenticating proof as a business record and as an act or admission long after the time respondents claimed they were misled into believing the sole basis of the trial court's ruling was the Business Records Act. It is a very succinct answer to the decision below erroneously adopting respondents' claim that the scores of lawyers that appeared for them had no notice of the basis upon which documents were offered and admitted. In fact, throughout the trial, all of respondents' motions and memoranda asserted the documents could not be admitted upon either basis offered.

As the court below pointed out insofar as admissibility is concerned, the test was

> "the standpoint of the defendant whose records are in question.
>
> "That question cannot be measured by the attitude of the other defendants who claim to be strangers to the record.
>
> "The cautionary instructions among other instructions, are supposed to meet the situation as to the defendants stranger to that record . . .
>
> * * *
>
> "Otherwise, there is not any situation that I know of whereby evidence of the acts done by one defendant as reflected by that defendant's records, could ever be used under any circum- (R. 3261-62)

Thus, respondents' argument directed to the use of Exhibit 5-A (assuming it to have been improper) long subsequent to its admission and only after other testimony and exhibits had independently established a *prima facie* case against each of the respondents is directed to the substantive rule of acts of a coconspirator. It cannot affect the correctness of the trial court's previous ruling admitting Union's document against Union upon proper *prima facie* authentication at the time it was offered.

V. Respondent's Brief re-emphasizes the importance of examining the Business Rcords Act and Palmer v. Hoffman.

Respondents twice asserted that *Palmer v. Hoffman* held that the terms of the Business Records Act are to be construed as "words of art" restricted by several hundred years of history to books of account and the like. (Br. in Opp. p. 9 and 17).

Respondents simultaneously recognized that *Palmer v. Hoffman* also held that the test is the

factual "probability of trustworthiness of records" * * * "acquired from the source, origin and the nature of their compilation" (318 U.S. 113-114). The trial court resolved that question in favor of admissibility.

The court below analyzed the evidence solely in legal terms applicable to classes of documents. Nowhere did it consider any of the factual indicia of trustworthiness arising out of their routine preparation, transmittal and use in the business operation of respondent. The disparity of results possible under *Palmer v. Hoffman* requires a definitive statement of guiding principles to be applied to evidence offered as a business record. It has been the general rule that the trial judge must determine as a fact whether or not an offered business record should be admitted or rejected upon the authenticating evidence before him—a decision that should not be disturbed on appeal unless manifestly erroneous.

VI. Substantial Justice.

The order of the court below effectively terminated this litigation. Three months of work by the trial judge, 14 jurors, dozens of attorneys and scores of witnesses has been set at naught. Respondents' description of the order permitting a new trial under conditions excluding the necessary relevant and probative documentary evidence as "an interlocutory order" is legal sophistry at its worst. It is impossible to determine how any further foundation could be supplied for any of the documents. A further search of Respondents' records could uncover no other documents admissible under the rulings below. Petitioner will concede that Respondents did not conspire through resolution of their

respective directors or stockholders—the only evidence clearly admissible under the decision below.

Respondents had a full and fair trial before an impartial jury and conscientious and competent trial judge.[*] This Court should grant certiorari and reverse the decision below to afford justice to petitioner and other litigants within the Ninth Circuit.

Dated at Seattle, Washington this 26th day of May, 1958.

Respectfully submitted,

DONALD MCL. DAVIDSON,
WILLIAM H. FERGUSON,
CHARLES S. BURDELL,

Attorneys for Petitioner
1012 Northern Life Tower,
Seattle 1, Washington

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[*] Respondents have complained of several instances where the trial court allegedly refused respondents "the right to show facts contrary" to the authenticating evidence (Br. in Opp. p. 17). This is a wholly baseless misrepresentation of the trial court's conduct.

The first such request was for the trial court to refuse all Union exhibits until counsel examined upon voir dire or completed cross-examination (R. 3549), a hopelessly confusing procedure contrary to usual trial practice. On the second occasion, counsel made an offer of proof of what voir dire would show (R. 3646-47) and accordingly cannot conceivably claim it was denied any rights. On the third occasion the trial court did reserve ruling upon exhibits 8-C and 8-D at counsel's request upon objection that certain notations were not authenticated (R. 3715). Thereafter, upon further proof showing the person who made the notations and the time they were made, the exhibit was admitted. (R. 3718-19)

Finally, counsel did cross-examine the witness without objection or hindrance. He asked not a single question about Exhibits 8-C or 8-D or about any other of the numerous exhibits received or noted by the witness. He chose to elicit only the fact that the witness did not have personal knowledge of some of the exhibits. Since "lack of personal knowledge" is expressly stated in 28 U.S.C. Sec. 1732 not to effect admissibility, the court properly denied the motion to strike. (R. 4063-70). Respondents' trial asservations of legal rights were purely technical delaying tactics aimed solely at argument upon appeal. Whenever afforded the full and complete opportunity they said was necessary to controvert authenticating evidence, they offered none.